

EVAN ROSE, Cal. Bar No. 253478  
MATTHEW D. GOLD, N.Y. Bar No. 2073963  
LAURA FREMONT, Cal. Bar No. 159670  
KERRY O'BRIEN, Cal. Bar No. 149264  
LIN W. KAHN, Cal. Bar No. 261387  
Federal Trade Commission  
901 Market Street, Suite 570  
San Francisco, CA 94103  
Email: erose@ftc.gov; mgold@ftc.gov;  
lfremont@ftc.gov; kobrien@ftc.gov;  
lkahn@ftc.gov  
Telephone: (415) 848-5100  
Facsimile: (415) 848-5184

MARICELA SEGURA, Cal. Bar No. 225999  
Federal Trade Commission  
10877 Wilshire Blvd., Suite 700  
Los Angeles, CA 90024  
Email: msegura@ftc.gov  
Telephone: (310) 824-4343  
Facsimile: (310) 824-4380

Attorneys for Plaintiff  
FEDERAL TRADE COMMISSION

KELLOGG, HANSEN, TODD, FIGEL  
& FREDERICK, P.L.L.C.  
Michael K. Kellogg (*pro hac vice*)  
Mark C. Hansen (*pro hac vice*)  
Email: mkellogg@kellogghansen.com  
mhansen@kellogghansen.com

1615 M Street, N.W., Suite 400  
Washington, DC 20036  
Telephone: (202) 326-7900  
Facsimile: (202) 326-7999

SIDLEY AUSTIN LLP  
David L. Anderson (CA Bar No. 149604)  
Email: dlanderson@sidley.com

555 California Street, Suite 2000  
San Francisco, CA 94104  
Telephone: (415) 772-1200  
Facsimile: (415) 772-7400

Attorneys for Defendant  
AT&T MOBILITY LLC

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
San Francisco Division

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AT&T MOBILITY LLC, a limited liability  
company,

Defendant.

**Case No. 14-cv-04785-EMC**

**FURTHER JOINT CASE  
MANAGEMENT CONFERENCE  
STATEMENT**

Case Management Conference

Date: May 10, 2018  
Time: 10:30 a.m.  
Courtroom: 5, 17th Floor

1 The parties to the above-captioned action jointly submit this Further Joint Case  
 2 Management Conference Statement (“Statement”) pursuant to Civ. L.R. 16-9, the Standing  
 3 Order for All Judges of the Northern District of California, effective January 17, 2017, and the  
 4 Clerk’s Notice of April 18, 2018 (Dkt. #139). This document contains only new developments  
 5 since the prior Joint CMC Statement filed July 14, 2016 (Dkt. #107).

6 **3/4. Legal Issues/Motions:** On March 31, 2015, this Court issued an order denying  
 7 AT&T’s motion to dismiss the case under 15 U.S.C. § 45. *See* Dkt. #54. On August 29, 2016, a  
 8 panel of the Ninth Circuit issued an order reversing this Court’s decision and ordering the case  
 9 dismissed. *See FTC v. AT&T Mobility* (“AT&T II”), No. 15-16585, Dkt. #32-1. On May 9,  
 10 2017, the Court of Appeals ordered the case be reheard *en banc*. *See AT&T II*, Dkt. #73. On  
 11 February 26, 2018, the *en banc* Court, disagreeing with the panel decision, affirmed this Court’s  
 12 denial of AT&T’s motion to dismiss. *FTC v. AT&T Mobility LLC*, 883 F.3d 848 (9th Cir. 2018).  
 13 On April 25, 2018, the *en banc* Court’s mandate was filed on this Court’s docket. *See* Dkt.  
 14 #140–41.

15 AT&T intends to file a petition for certiorari in the Supreme Court. The deadline for  
 16 filing a petition is May 29, 2018. AT&T does not intend to seek an extension of that deadline.

17 **10. Related Cases:** On August 6, 2015, this Court issued an order finding *Roberts v.*  
 18 *AT&T Mobility LLC*, No. 15-cv-03418, to be related to this case. *See* Dkt. #77.

19 **12. Settlement and ADR:** The parties have participated in six ADR phone  
 20 conferences with Howard Herman, Director of this Court’s ADR Program, but have not yet  
 21 engaged in substantive settlement discussions. After the Ninth Circuit’s initial panel decision,  
 22 the parties jointly proposed, and the ADR office agreed, that future calls be further postponed  
 23 until proceedings before the Ninth Circuit were completed.

24 Currently, the parties are preparing to engage in direct settlement discussions.  
 25 Accordingly, though the parties share an interest in exploring whether the case can be resolved  
 26 through settlement, they do not propose resuming ADR at this time.

27 **8/17. Discovery/Scheduling:** Prior to the Ninth Circuit’s panel decision, this Court had  
 28 ordered that discovery pending the interlocutory appeal proceed in “phases.” To that end, the

1 parties had completed all of a first phase of document discovery and most, but not all, of a  
2 second phase of discovery including document productions and depositions. A third phase of  
3 discovery, also to include document productions and depositions, had not been authorized. *See*  
4 Dkt. #108 (civil minutes staying Phase III discovery).

5 The parties have not been able to agree on a proposed litigation schedule going forward.  
6 Accordingly, each party's position is set forth below.

7 Plaintiff's Position: The FTC respectfully requests that the Court authorize discovery to  
8 resume. Further delay is unwarranted and jeopardizes the preservation of key evidence and  
9 testimony in this matter—some of which concerns events that occurred more than a decade ago.  
10 Neither the parties' nascent settlement discussions nor Defendant's cert. application justifies a  
11 continued stay.

12 First, with respect to settlement negotiations, the FTC would, of course, have no interest  
13 in needlessly incurring the cost of discovery if the parties were on the cusp of settlement. But if  
14 the limited, exploratory steps that are likely to be taken in the near term were good enough  
15 reason for a stay, no case would ever litigate. Indeed, as of the date of this filing, not a single  
16 substantive discussion has taken place, and no offers have been exchanged.

17 Second, AT&T's cert. application would not be likely to be granted. Nothing about this  
18 case makes it an attractive candidate for further review. The *en banc* panel was unanimous, and  
19 its opinion is thorough, well reasoned, and grounded in decades or even centuries of law defining  
20 the meaning of the term "common carrier." And while the original panel's ruling did present an  
21 important issue because it created a significant regulatory gap, the *en banc* ruling, having  
22 eliminated that gap, presents no compelling policy reason for reversal. Nor will the *en banc*  
23 ruling have any adverse impact on the telecommunications industry as a whole. In fact, other  
24 leading telecommunications companies—Charter Communications, Comcast Corporation, Cox  
25 Communications, and Verizon—filed a brief opposing AT&T's position and supporting the  
26 FTC's reading of the statute. Brief of Charter Commc'ns, Comcast Corp., Cox Commc'ns, and  
27 Verizon in Support of the FTC, *AT&T II*, Dkt. #94-2.

1           Additionally, the *en banc* opinion does not conflict with any decision of another court.  
2           As the opinion makes clear, the Seventh Circuit in *Miller* did not address the issue presented  
3           here, so there can be no conflict. 883 F.3d at 861. The *en banc* opinion is fully consistent with  
4           cases from the Supreme Court, the D.C. Circuit, the Second Circuit, the Eleventh Circuit, and the  
5           Ninth Circuit itself, all recognizing that whether a company is a common carrier turns on the  
6           specific activity under scrutiny. *Id.* at 860–61.

7           In any event, Supreme Court review is rarely granted: The Court hears about 80 cases  
8           per year out of as many as 8,000 petitions filed. Those statistics alone make a grant unlikely.

9           Finally, even if the Court concludes that the Supreme Court is likely to grant cert., the  
10          FTC respectfully requests that, at a minimum, phased discovery resume in the interim. The  
11          parties have essentially returned to the position they were in before the three-judge panel issued  
12          its opinion: The prevailing opinion favors the FTC, and AT&T is seeking an appeal of that  
13          opinion. The Court previously had weighed, on the one hand, the prejudice to the FTC of fading  
14          memories and the cost to injured consumers of delayed relief, and, on the other hand, the burden  
15          to AT&T of continued discovery while an appeal was pending. The Court decided that phased  
16          discovery struck the appropriate balance. The Ninth Circuit’s *en banc* ruling justifies, at the very  
17          least, continuing on that previous course now.

18          Defendant’s Position: AT&T’s cert. petition and the parties’ present intention to engage  
19          in substantive settlement negotiations present independent reasons warranting a continued stay of  
20          discovery. Together, they make continuance of the stay an easy question.

21          AT&T’s cert. petition has a strong chance of being granted. Two of the most important  
22          factors in the Supreme Court’s decision on whether to review a case are whether there is a split  
23          among the circuits on the question presented and whether the issue is important. *See* Sup. Ct. R.  
24          10(a) (circuit-court conflict), 10(c) (“important question of federal law”). Both factors are  
25          present here.

26          There is plainly a circuit split. As this Court acknowledged when it denied AT&T’s  
27          motion to dismiss, the Seventh Circuit “address[ed] *the exact issue*” AT&T’s motion presented,  
28          and this Court decided not to follow that court’s approach. Dkt. #54, at 15 n.7 (emphasis added).

1 Then, in authorizing an interlocutory appeal of the issue, this Court again explained that the  
2 question presented is “difficult” and that “there is, in effect, a dispute between other circuit  
3 courts on the question.” Dkt. #68, at 2. Even the Ninth Circuit split on the question, confirming  
4 the difficulty of the question presented. It considered the issue twice—once as a three-judge  
5 panel and once sitting *en banc*—and decided it two different ways.

6 The FTC cannot be heard to disagree about the significance of the issue. In urging the  
7 Ninth Circuit to rehear the case *en banc*, the FTC labeled the case one of “exceptional  
8 importance” that would affect regulation of “companies” and “lines of business” beyond the  
9 present circumstances. FTC Pet. for Reh’g 1, 2, *AT&T II*, Dkt. #33. It marshaled support for its  
10 position from multiple *amici curiae*, including the Federal Communications Commission, which  
11 likewise urged *en banc* review and attested to the case’s broader importance to the federal  
12 regulatory scheme. *See, e.g.*, FCC Amicus Br. 4, *AT&T II*, Dkt. #37-1 (discussing impact of  
13 panel decision on “consumer privacy policy”).

14 Although the likelihood of Supreme Court review is itself a sufficient reason not to  
15 resume proceedings, the case for a stay is even stronger where, *in addition* to the possibility of  
16 certiorari, substantive settlement discussions are ongoing. *See Sanford v. Capital City Rests.,*  
17 *Inc.*, No. CIV. 05-0519 WBS-JFM, 2006 WL 5003842, at \*1 n.1 (E.D. Cal. Jan. 12, 2006)  
18 (possibility “that settlement discussions between the parties might prove fruitful” can justify  
19 stay). A stay is certainly justified while *both* AT&T’s cert. petition and active settlement  
20 discussions remain live issues.

21 At a minimum, a time-limited stay while the parties explore the possibility of a settlement  
22 is sensible, subject to potential elongation if discussions prove constructive. Indeed, contrary to  
23 the FTC’s suggestion, the prospect of productive settlement discussions significantly  
24 distinguishes the current posture of the case from “the position [the parties] were in before the  
25 three-judge panel issued its opinion.” AT&T is prepared to litigate this case and resume  
26 discovery, but it should not be required to do so needlessly. The benefits and potentially avoided  
27 costs of a limited further stay far outweigh any interest in resuming litigation that, now more  
28 than ever, may not be necessary.

1  
2 Dated: May 1, 2018

Respectfully submitted,

3  
4 /s/ Evan Rose

5 EVAN ROSE  
6 MATTHEW D. GOLD  
7 LAURA FREMONT  
8 KERRY O'BRIEN  
9 LIN W. KAHN

Attorneys for Plaintiff  
FEDERAL TRADE COMMISSION

10 (The filer attests that concurrence in the filing of this document has been obtained from  
11 the other signatories.)

12 KELLOGG, HANSEN, TODD, FIGEL &  
13 FREDERICK, P.L.L.C.  
14 1615 M Street N.W., Suite 400  
Washington, DC 20036

15 /s/ Michael K. Kellogg

16 Michael K. Kellogg  
17 Mark C. Hansen

18 SIDLEY AUSTIN LLP  
19 555 California Street, Suite 2000  
20 San Francisco, CA 94104

21 /s/ David L. Anderson

22 David L. Anderson

23 Attorneys for Defendant  
24 AT&T MOBILITY LLC  
25  
26  
27  
28